

**Community Health Services, Inc. and Local #5050,
Federation of Community Health Professionals,
a/w Maine Federation of Teachers, Nurses and
Health Professionals, AFT-AFL-CIO. Case 1-
CA-19384**

April 27, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

Upon a charge filed on December 24, 1981, by Local #5050, Federation of Community Health Professionals, a/w Maine Federation of Teachers, Nurses and Health Professionals, AFT-AFL-CIO, herein called the Union, and duly served on Community Health Services, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 1, issued a complaint on January 18, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on November 20, 1981, following a Board election in Case 1-RC-17139, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about December 3, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On January 22, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On February 8, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 12, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent

thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Notice To Show Cause, Respondent admits its refusal to bargain but denies that it thereby violated Section 8(a)(5) and (1) of the Act. Respondent's answer to the complaint contends that the bargaining unit described in the complaint (which was found by the Board to be appropriate in its November 20, 1981, Decision) is not appropriate for purposes of collective bargaining within the meaning of the Act. In its response to the Notice To Show Cause, Respondent further states that (1) there are no genuine issues of fact at issue herein; (2) the only issue is one of law, namely, whether the bargaining unit certified herein is appropriate; and (3) Respondent is entitled to summary judgment as a matter of law on the ground that the certified unit is not appropriate. Counsel for the General Counsel argues that Respondent's contentions are without merit as they raise issues which were presented to and decided by the Board in the underlying representation case. We agree.

A review of the record herein, including the record in Case 1-RC-17139, shows the following: On December 29, 1980, the Union filed a petition in Case 1-RC-17139, to represent certain employees of Respondent. After a hearing, the Acting Regional Director issued a Decision and Direction of Election, in which he found that the following employees constituted an appropriate unit:

All full-time and regular part-time professional employees employed by the Employer at its various locations within the State of Maine, including registered nurses, graduate nurses, physical therapists, occupational therapists and mental health workers, but excluding all other employees, licensed practical nurses, VD epidemiologists, outreach workers, home health aides, office clerical employees, guards and supervisors as defined in the Act.

On February 18, 1981, Respondent filed a request for review of the Acting Regional Director's Decision, contending *inter alia* that the Acting Regional Director erred by finding a unit limited to Respondent's professional employees appropriate and by finding that Respondent's mental health workers

¹ Official notice is taken of the record in the representation proceeding, Case 1-RC-17139, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

(MHWs) are professional employees under the Act. On March 5, the Board denied Respondent's request for review, but amended the Acting Regional Director's Decision to permit the MHWs to vote subject to challenge.

On March 6, 1981, an election by secret ballot was conducted under the direction and supervision of the Regional Director for Region 1 among the employees in the amended unit. The tally was 27 votes for, and 23 votes against, the Union, with 12 determinative challenged ballots. On March 13, 1981, Respondent filed timely objections to the conduct of the election.

On April 23, 1981, the Regional Director issued a Supplemental Decision which overruled Respondent's objections and the challenges to the ballots of the 12 MHWs and directed that their ballots be opened and counted. Thereafter, on May 5, 1981, Respondent filed a request for review of the Regional Director's Supplemental Decision. On June 26, 1981, the Board granted Respondent's request for review solely with respect to the Regional Director's disposition of the 12 challenged ballots of the MHWs.

On November 20, 1981, the Board issued its Decision on Review and Certification of Representative.² The Board found, contrary to the Regional Director, that Respondent's 12 MHWs should be excluded from the unit, and that the challenges to their ballots should therefore be sustained. Accordingly, the Board issued a Certification of Representative, certifying the Union as the exclusive representative of the following appropriate unit:

All full-time and regular part-time professional employees employed by the Employer at its various locations within the State of Maine, including registered nurses, graduate nurses, physical therapists and occupational therapists, but excluding all other employees, licensed practical nurses, VD epidemiologists, outreach workers, home health aides, mental health workers, office clerical employees, guards and supervisors as defined in the Act.

Subsequently, by letter dated November 25, 1981, the Union requested that Respondent meet for the purpose of bargaining and negotiating a collective-bargaining agreement. By letter dated December 3, 1981, Respondent refused to bargain with the Union, in order to seek judicial review as to the appropriate bargaining unit.

The issues which Respondent seeks to raise at this time were raised and decided by the Board in the underlying representation proceeding. In denying Respondent's February 18, 1981, request for

review, the Board found that Respondent had raised no substantial issues warranting review as to the Acting Regional Director's finding that a unit consisting of Respondent's professional employees was appropriate. Furthermore, Respondent acknowledges that it is refusing to bargain with the Union in order to obtain judicial review of the Board's findings.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.³

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant counsel for the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Maine corporation, maintains its principal office and place of business at 98 Chestnut Street, Portland, Maine, and is engaged at that location, and other locations within the State of Maine, in providing community health and home health care services. Respondent, in the course and conduct of its business, causes and continuously has caused, at all times herein mentioned, large quantities of materials used by it in the course of its operations to be purchased and transported in interstate commerce from and through various States of the United States other than the State of Maine. In the course and conduct of its above-described operations, Respondent annually derives gross revenues in excess of \$1 million, and receives at its various Maine locations income, goods, and materials valued in excess of \$10,000 directly from points outside the State of Maine.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within

² 259 NLRB 362.

³ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Local #5050, Federation of Community Health Professionals, a/w Maine Federation of Teachers, Nurses and Health Professionals, AFT-AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time professional employees employed by the Employer at its various locations within the State of Maine, including registered nurses, graduate nurses, physical therapists and occupational therapists, but excluding all other employees, licensed practical nurses, VD epidemiologists, outreach workers, home health aides, mental health workers, office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On March 6, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 1, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on November 20, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about November 25, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about December 3, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive repre-

sentative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since December 3, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Community Health Services, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local #5050, Federation of Community Health Professionals, a/w Maine Federation of Teachers, Nurses and Health Professionals, AFT-

AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time professional employees employed by the Employer at its various locations within the State of Maine, including registered nurses, graduate nurses, physical therapists and occupational therapists, but excluding all other employees, licensed practical nurses, VD epidemiologists, outreach workers, home health aides, mental health workers, office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all time since March 6, 1981, and November 20, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about December 3, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Community Health Services, Inc., Portland, Maine, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local #5050, Federation of Community Health Professionals, a/w Maine Federation of Teachers, Nurses and Health Professionals, AFT-AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time professional employees employed by the Employer at its

various locations within the State of Maine, including registered nurses, graduate nurses, physical therapists and occupational therapists, but excluding all other employees, licensed practical nurses, VD epidemiologists, outreach workers, home health aides, mental health workers, office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at all of its Maine locations copies of the attached notice marked "Appendix."⁴ Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁴ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local #5050, Federation of Community Health Professionals, a/w Maine Federation of Teachers, Nurses and Health Professionals,

AFT-AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time professional employees employed by the Employer at its various locations within the State of Maine, including registered nurses, graduate nurses, physical therapists and occupational therapists, but excluding all other employees, licensed practical nurses, VD epidemiologists, outreach workers, home health aides, mental health workers, office clerical employees, guards and supervisors as defined in the Act.

COMMUNITY HEALTH SERVICES, INC.